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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WILLIAM DUNCAN, Warden, *Petitioner*,

v.

RONNIE EARL BAYLOR, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
LINDA C. JOHNSON
Supervising Deputy Attorney General
* ALENE M. GAMES
Deputy Attorney General
* Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2369
Counsel for Petitioner

32 PP

QUESTION PRESENTED

Under the Anti-terrorism and Effective Death Penalty Act of 1996, does § 2254(d)(1) of 28 U.S.C. require federal courts, in habeas corpus cases, to defer to state court adjudications of an ineffective assistance of counsel claim unless the decision is an "unreasonable application" of *Strickland v. Washington*, 466 U.S. 668 (1984), or does the effect of the "contrary to" prong of § 2254(d)(1) leave a federal court's historic power to exercise *de novo* plenary review "not affected?"

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

WILLIAM DUNCAN, Warden, *Petitioner*,

v.

RONNIE EARL BAYLOR, *Respondent*.

William Duncan, Warden, of the California Men's Colony at San Luis Obispo, ("the Warden") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1/]

OPINION BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the district court, is reported as *Baylor v. Estelle*, 94 F.3d 1321 (9th Cir. 1996). A copy of the opinion is reproduced in Appendix A of this Petition. The order of the Ninth Circuit, denying rehearing and rehearing *en banc*, is unreported and reproduced in Appendix B. The order of the California Supreme Court, denying Baylor's petition for writ of *habeas corpus* is unpublished, and is reproduced in Appendix C.

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1. Wayne Estelle, the former Warden of the California Men's Colony, San Luis Obispo, has been replaced by William Duncan, the current Warden. Thus, William Duncan is the proper Petitioner in this case.

STATEMENT OF JURISDICTION

The opinion below was filed on September 4, 1996. The Ninth Circuit denied the Warden's petition for rehearing and suggestion for rehearing *en banc* on October 24, 1996.

Respondent Baylor first invoked federal court jurisdiction in his *habeas corpus* case under 28 U.S.C. § 2254. The Warden now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Section 2254 of title 28, United States Code, provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .
>
> (d) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

In 1987, Ronnie Earl Baylor, then a Marine Corps sergeant, was convicted of, inter alia, rape, assault with the intent to commit rape, and sodomy against two women in separate incidents, in Twenty-nine Palms, California. The basis for Baylor's conviction included his confession, where Baylor revealed the details of the sexual assaults, including that he had prior to the rape of one victim removed five bullets from her gun, while she was sleeping, and hid the bullets under a large sofa chair in the victim's living room. Acting on his confession, the police recovered the five bullets from under the chair, and they were admitted into evidence at trial.

Baylor appealed his conviction, but raised only sentencing errors. In 1990, Baylor filed a *habeas corpus* petition with the California Supreme Court where he alleged, inter alia, he was denied his Sixth Amendment right to effective assistance of trial counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), because counsel failed to present a potentially exculpatory criminalistic laboratory report at trial. The petition acknowledged Baylor's rape and sexual assault convictions, involving two women on separate occasions, and his confession, but alleged that the unadmitted report would have excluded him as the semen donor of semen collected in one of the rapes. The court denied the petition without citation to authority. (Appendix C.)

In 1991, Baylor filed a *habeas corpus* petition with the United States District Court, raising the same issue. The magistrate judge ordered an evidentiary hearing to determine whether Baylor received effective assistance of counsel. After the hearing, the magistrate judge found trial counsel's performance was inadequate under *Strickland v. Washington*, but in light of Baylor's detailed and taped confession to police,[2] Baylor was not prejudiced because the laboratory report did not absolutely exclude him as the rapist as to one of the victims. The district court judge adopted the magistrate judge's recommendations, and dismissed the petition with prejudice, stating, had Baylor submitted evidence that his semen was somehow different from the semen collected from the rape victims, his petition would have been granted.

Baylor filed a motion for reconsideration, and asked that his semen be tested now, in 1994. The district court ordered the testing over the Warden's objection that the test results would be irrelevant given there was no scientific basis to assure that a test given seven years after the assault would accurately reflect the condition of Baylor's semen at the time of the sexual assaults. The original criminalist, who analyzed the rape samples in 1987 and produced the laboratory report, analyzed Baylor's current semen sample. He opined Baylor still could not be eliminated as the rapist as to one of the victims. However, a defense expert opined that Baylor could be eliminated as the semen donor, and a newly appointed independent expert was unequivocal that Baylor could not

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2. Baylor, a Marine Corps sergeant at the time of his confession, repudiated the taped confession at trial, stating the police detective coerced him, and supplied him with details of the attacks. However, Baylor moved to suppress the confession on the sole ground he did not receive sufficient *Miranda* warnings before he confessed.

have been the rapist.[3] The district court judge characterized these opinions as "unrefuted scientific evidence" that Baylor could not have been the rapist, and concluded that such evidence would have caused the jury to have a reasonable doubt as to Baylor's guilt as to all seven of the criminal charges against him, despite his confession. The district court granted the petition, and vacated all seven convictions against Baylor, which included rape, sodomy, assault with intent to commit rape, robbery, grand theft of a firearm, and two counts of burglary.[4] The Warden timely appealed the district court's judgment.

On appeal before the Court of Appeals for the Ninth Circuit, approximately six weeks before oral argument, the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law. The Ninth Circuit permitted supplemental briefing on the applicability of the Act to pending cases. The Warden argued, inter alia, that under section 2254(d)(1), the California Supreme Court's denial of Baylor's state *habeas corpus* petition was neither "contrary to" nor an "unreasonable application of" *Strickland*.

In its published opinion, the Ninth Circuit upheld the district court's grant of the writ under the "old law," but noted that "whether or not the [Anti-terrorism and Effective Death Penalty] Act applies to pending appeals, our decision would be the same." *Baylor v. Estelle*, 94 F.3d

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3. The independent expert was not appointed to render a legal opinion as to the sufficiency of the evidence under California's rape statute.

4. Baylor had been released from state prison, on parole, approximately three weeks before the district court's decision. However, a reinstatement of the convictions against him would carry collateral legal consequences. Therefore, a live controversy still remains. *Minnesota v. Dickerson*, 508 U.S. 366, 371-372 n.2 (1993).

1321, 1325 (9th Cir. 1996).[5/] The court found that under the newly amended § 2254(d), the court's "analysis in this case is not affected," *id.* at 1323, holding that "[i]n this case, the state court decision was contrary to clearly established federal law determined by the Court in *Strickland*." *Id.* at 1325.

Under its "not affected" analysis, the Ninth Circuit, in effect, conducted a *de novo* plenary review of Baylor's ineffective assistance of counsel claim. Under this standard, the court found deficient performance and prejudice under *Strickland*.

The Warden filed a timely petition for rehearing and rehearing *en banc*, arguing the Ninth Circuit's ruling, that the California Supreme Court decision was "contrary to" *Strickland*, had misinterpreted § 2254(d)(1). The petition argued that the "contrary to" prong of § 2254(d)(1) simply required inquiry into whether the state court had applied the correct legal standard. The petition further stated there was no indication the California Supreme Court used any legal standard other than *Strickland* to evaluate and deny Baylor's state *habeas* petition. Therefore, the state adjudication was not "contrary to" clearly established federal law within the meaning of the first prong of § 2254(d)(1).

The petition for rehearing also argued the Ninth Circuit's interpretation of § 2254(d)(1) rendered the "unreasonable application" language of the statute meaningless and superfluous. The Warden further argued the proper inquiry should therefore have been whether the state court's adjudication was "an unreasonable application of" *Strickland*, and asked the Ninth Circuit to

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5. The Warden submits the AEDPA does apply to pending cases. That issue is already before the Court in *Lindh v. Murphy*, case number 96-6298. The issue presented in the instant petition is the effect that newly amended § 2254(d)(1) has on federal review of state court adjudications.

review this case under the second prong of § 2254(d)(1). The Ninth Circuit denied the petition for rehearing and suggestion for rehearing *en banc*. (Appendix B.)

REASONS FOR GRANTING THE PETITION

This case requires the Court to decide, if, and when, the "contrary to" prong of amended § 2254(d)(1) applies to state court denials of ineffective assistance of counsel claims, alleged under the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). Does this provision apply at all, where there is no showing, or even any question, that the state court applied anything but *Strickland* in denying the claim?

Thus, the Court must decide if, as other circuits have held, the "contrary to" prong of § 2254(d)(1) simply requires inquiry as to whether an applicable standard even exists, see *Lindh v. Murphy*, 96 F.3d 856, 868-869, 874, 875-876 (7th Cir. 1996), and, if so, the inquiry focuses on whether the state court has applied the standard to the case, see *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), or if, this inquiry instead allows, as the Ninth Circuit has necessarily done in this case, a federal court to conduct plenary *de novo* review. Thus, the Court must decide if the Warden is correct, as he argued before the Ninth Circuit, that the "contrary to" prong is not violated where there is no reason to believe that the state court applied anything else but the *Strickland* standard in denying the claim.

The Court's authoritative guidance on these questions is vital because there is a conflict among the Courts of Appeals, as to the proper statutory construction of § 2254(d)(1).

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE PROPER INTERPRETATION OF 28 U.S.C. § 2254 (d)

Historically, the Court has characterized an ineffective assistance of counsel claim under *Strickland* as a mixed question of law and fact. See, *Strickland*, at 698; *Thompson v. Keohane*, ___ U.S. ___, 133 L.Ed.2d 383, 394 (1995). The Ninth Circuit's interpretation of amended § 2254(d)(1) creates a conflict with decisions from the Fifth and Seventh Circuits concerning the applicability of the new statute to such a question of law and fact. In *Drinkard v. Johnson*, 97 F.3d 751 (5th Cir. 1996) and *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), the Courts of Appeals found the new subdivision 2254(d) creates a deferential standard for *habeas* review of state court convictions.

The three-tier pattern of the statute logically corresponds to the three types of issues which may be raised in any case: questions of law, mixed questions of law and fact, and questions of fact. Therefore, under the first prong of section 2254(d)(1), the standard of federal review for purely legal questions should be whether the state court decision was "contrary to" clearly established Federal law, as determined by the Court. Under the second prong of § 2254(d)(1), the standard of review for mixed questions of law and fact should be whether the state court decision involved "an unreasonable application" of clearly established Federal law, as determined by the Court. Under § 2254(d)(2), the standard of review for purely factual determinations should be whether the state court decision was based on "an unreasonable determination of the facts" in light of the evidence

presented in the State court proceeding. This interpretation gives full effect to each provision of section 2254(d). *Lindh v. Murphy*, 96 F.3d at 870; *Drinkard v. Johnson*, 97 F.3d at 767-68.

The *Baylor* decision, in conflict with *Lindh* and *Drinkard*, did not draw any of the above-described distinctions, and instead summarily found the state court adjudication was "contrary to" *Strickland*, without consideration of whether there was "an unreasonable application of" *Strickland*, essentially blurring any distinction intended by Congress. The court, without explanation, reviewed the *Strickland* claim under the "contrary to" language of § 2254(d)(1). The only authority cited by the court in support of its view was *Ayala v. Speckard*, 89 F.3d 91, 96-97 (2d Cir. 1996). In *Ayala*, it appeared the state court failed to consider three of the necessary four prongs to determine whether court proceedings should be open to the public, as established by the United States Supreme Court. Since the state court failed to use the proper legal standard, as required under Supreme Court precedent, the state court judgment *was* "contrary to" clearly established federal law. *Id.* at 96-97. *Ayala* does not appear to support the Ninth Circuit's position.

The conflict between *Baylor* and *Lindh* or *Drinkard* shows one interpretation defers to the state court adjudication, while the other interpretation retains *de novo* plenary review.

Lindh holds

> . . . we do not read the 'contrary to . . .' language to authorize issuance of a writ whenever a court errs, as Lindh and amici prefer; that would vitiate the second ('unreasonable application') clause of § 2254(d)(1). The two clauses have separate functions. We must ensure that the Supreme Court of Wisconsin adheres to legal principles

> articulated by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts--when it is, in the standard phrase, a 'mixed question of law and fact' --sec. 2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects 'an unreasonable application' of the law.

Lindh, 96 F.3d at 869.

Lindh further holds "For current purposes, it is enough to say that when the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored." *Lindh*, 96 F.3d at 870.

Similarly, *Drinkard* holds "The first question we ask is whether the state court's resolution of any legal questions underlying its decision on this claim was contrary to clearly established federal law . . . . The court correctly determined the law applicable to Drinkard's claim." *Drinkard*, 97 F.3d at 768.

Drinkard further holds

> an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect. In other words, we can grant *habeas* relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.

Drinkard, 97 F.3d at 769.

On the other hand, the *Baylor* court, by holding that its analysis "is not affected by [the amended] § 2254(d)," in effect, conducted a *de novo* plenary review. *Id*. at 1323-4. In conducting this review, *Baylor* states further that even though the state court conviction was based on "strong evidence," "we cannot say the *district*

court erred . . . *Our* confidence in the outcome of the trial is shaken." *Baylor*, 94 F.3d at 1324, emphasis added. Thus, where *Lindh* and *Drinkard* look only for the applicable legal standard on pure questions of law, and give deference to the state court on mixed questions of law and fact, *Baylor* instead gives deference to the lower federal court, based on plenary review, and does not examine the reasonableness of the state court adjudication.[6/]

These conflicting interpretations, of the identical statute, are irreconcilable, and the conflict can only be resolved by the Court. The various interpretations of § 2254(d) have left the intent and meaning of the statute in a state of confusion, with no direction for the lower courts.

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6. If the Ninth Circuit had found, as it should have, the AEDPA applies to pending cases, and if the Ninth Circuit had examined the reasonableness of the California Supreme Court's adjudication under the second prong of § 2254(d)(1), as it should have, the Warden would have prevailed.

Baylor has not, and cannot, show the California Supreme Court unreasonably applied both prongs of *Strickland*, in a case where we know what was before the California Supreme Court by way of Baylor's petition, and the applicable law: 1) Baylor was convicted of two separate incidents of sexual offenses, committed against different victims; 2) Baylor confessed to both incidents; 3) an unadmitted laboratory report would have excluded him as the semen donor of semen collected in one of the rapes; and 4) proof identifying the defendant's semen in or on the rape victim is not an element of rape under California law. See California Penal Code § 261.

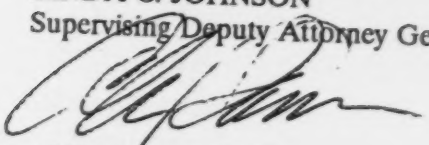
CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, in the case at bar.

Dated: January 21, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
LINDA C. JOHNSON
Supervising Deputy Attorney General



ALENE M. GAMES
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

AMG:lm
LA94FA0031

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONNIE EARL BAYLOR,
Petitioner-Appellee,

v.

WAYNE ESTELLE, WARDEN; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellants.

No. 95-56124
D.C. No. CV-91-3752-KN(EE)
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding

Argued and Submitted June 4, 1996
Submission Vacated June 5, 1996
Resubmitted
July 26, 1996—Pasadena, California

Filed September 4, 1996

Before: Melvin Brunetti and Pamela Ann Rymer, Circuit Judges, and Jack E. Tanner,* District Judge.

Opinion by Judge Rymer

*Honorable Jack E. Tanner, Senior United States District Judge, Western District of Washington, sitting by designation.

SUMMARY

Criminal Law and Procedure/Right to Counsel/ Sex Crimes

The court of appeals affirmed a district court judgment. The court held that counsel did not give reasonably effective assistance, where counsel failed to follow up on a criminalist's report that concluded that a semen sample taken from a victim that the defendant was convicted of sexually assaulting might not have come from the defendant.

Appellee Ronnie Baylor was charged with forcible rape, forcible sodomy, assault with intent to commit rape, and related burglary and robbery of two victims. Several months before trial, David Stockwell, a criminalist, issued a report in which he compared a blood and saliva sample from Baylor with seminal fluid from vaginal swabs obtained from the first victim, and with semen stains from items of clothing from the second victim. Stockwell concluded that the results would tend to eliminate Baylor as the semen donor because Baylor is a "secretor" and the semen donor was not, but that there was a possibility that Baylor mimics a nonsecretor and that that theory could not be tested without a liquid semen sample from Baylor.

Baylor's counsel knew about the report before trial, but did not follow up with Stockwell or have Baylor tested by another expert. Counsel tried to subpoena Stockwell during trial, but Stockwell was on vacation. The report was inadmissible.

At trial, no witness identified Baylor, and there was no physical evidence that linked Baylor to the crimes. A detective to whom Baylor had confessed, however, testified. Baylor also testified, offering an alibi and recanting his confession. A jury convicted Baylor, and he was sentenced. Baylor filed a petition for writ of habeas corpus with the California Supreme Court, which was denied.

Baylor filed a petition for writ of habeas corpus in the district court, alleging that trial counsel's failure to get the Stockwell report admitted into evidence was ineffective assistance. The court initially adopted the Findings, Conclusions and Recommendations of a magistrate judge denying the petition on the ground that Baylor had not show prejudice in the absence of evidence that he was a nonsecretor. However, the court granted Baylor's motion for relief from judgment and ordered serological testing of his seminal fluid. Based on laboratory results and the opinions of experts, the court found that trial counsel's performance was "completely inadequate" and that there was "at least a reasonable probability that the evidence presented would have tended to show" that Baylor could not have been the source of semen found. Baylor's federal petition pursuant to 28 U.S.C. § 2254 was granted. The State appealed, challenging the writ and arguing that new provisions of § 2254 in the Antiterrorism and Effective Death Penalty Act of 1996 (Antiterrorism Act) required reversal.

[1] Whether or not Stockwell's report was itself conclusive, the report was one test away from tilting the scale powerfully in Baylor's direction. Even without further testing, the report would have greatly decreased the odds that Baylor was the donor and buttressed the credibility of Baylor's alibi and recantation at trial. The district court was correct in concluding that counsel did not give reasonably effective assistance.

[2] Although Baylor's confession was strong evidence that he committed both assaults, it could not be said that the district court erred in concluding that he was prejudiced. The laboratory reports and the analysis of two experts indicated that Baylor did not mimic a nonsecretor and therefore could be excluded as the donor of the semen found on the first victim. [3] Baylor showed prejudice.

[4] Whether or not the Antiterrorism Act applies to pending appeals, the decision in this case would be the same. The state

court decision was contrary to clearly established federal law determined by the Supreme Court in a case.

COUNSEL

Alene M. Games, Deputy Attorney General, Los Angeles, California, for the respondents-appellants.

Seymour I. Cohen, Torrance, California, for the petitioner-appellee.

OPINION

RYMER, Circuit Judge:

Ronnie Earl Baylor's trial counsel failed to follow-up on a criminalist's report that concluded that a semen sample taken from one of the victims he was convicted of sexually assaulting might not have come from Baylor. Baylor's petition for writ of habeas corpus filed in the California Supreme Court, which raised ineffective assistance of counsel, was denied without citation to authority; his federal petition pursuant to 28 U.S.C. § 2254 was granted following an evidentiary hearing. The state has timely appealed, challenging the writ under the "old law," and arguing in addition that the new provisions of § 2254[1] (enacted April 24, 1996, after the district court's

[1]Amended section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

decision was rendered and opening briefs were filed) in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, (Antiterrorism Act), apply to this appeal and also require reversal.

Because we affirm the district court's writ of habeas corpus, we must decide whether § 2254(d), upon which the state relies, requires a different result. Whether or not the new Act will apply to other cases on appeal, *Strickland v. Washington*, 466 U.S. 668 (1984), has long been clearly established federal law determined by the Supreme Court of the United States. We therefore conclude that our analysis in this case is not affected by § 2254(d).

We have jurisdiction, 28 U.S.C. §§ 1291, 2253, and affirm.

I

Baylor was charged with forcible rape, forcible sodomy, assault with intent to commit rape and related burglary and robbery of two victims occurring in December 1986 and January 1987. Several months before trial, David Stockwell, a criminalist in the Sheriff's Crime Laboratory, issued a report in which he compared a blood and saliva sample from Baylor with seminal fluid from vaginal swabs obtained from the first victim, and with semen stains from items of clothing from the second victim. Stockwell concluded that the results would tend to eliminate Baylor as the semen donor because Baylor is a "secretor" and the semen donor wasn't, but that there is a possibility that Baylor mimics a nonsecretor and that this theory could not be tested without a liquid semen sample from

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law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Baylor. Baylor's counsel knew about the report before trial but neither followed-up with Stockwell nor had Baylor tested by another expert. While counsel tried to subpoena Stockwell during trial, it turned out that Stockwell was on vacation; without a foundation, the report was, of course, inadmissible.

At trial, no witness identified Baylor and there was no physical evidence linking him to the crimes. However, Baylor had confessed, in some detail, on tape, to detective Roderick, who testified; Baylor also testified, offering an alibi (which his wife corroborated for the first victim) and recanting his confession, saying that he confessed only because Roderick threatened him and fed him the details.

The jury convicted Baylor on all counts, and he was sentenced to a term of 16 years in custody. After his sentence was affirmed on direct appeal, Baylor filed a petition for writ of habeas corpus with the California Supreme Court June 19, 1990, which was denied August 15, 1990 without citation to authority. Baylor then filed his petition for writ of habeas corpus in the district court, alleging that trial counsel's failure to get the Stockwell report admitted into evidence was ineffective assistance. Although the district court initially adopted the Findings, Conclusions and Recommendations of the magistrate judge denying the petition on the ground that Baylor had not shown prejudice in the absence of evidence that he was a nonsecretor, the court granted Baylor's motion for relief from judgment and ordered serological testing of his seminal fluid. Based on laboratory results and the opinions of both a defense expert as well as an independent expert that the semen on the vaginal swabs is genetically incompatible with originating from Baylor, the district court found that trial counsel's performance was "completely inadequate" and that "there is at least a reasonable probability that the evidence presented would have tended to show that Petitioner could not have been the source of the semen found in [the] victim." The court further concluded that, even in the face of the strong evidence provided by Baylor's taped confession, "there is a

reasonable probability that the evidence that would have been presented but for counsel's ineffective assistance would have injected reasonable doubt in the jurors' minds in regards to all of Petitioner's convictions."

II

A

The state argues that Baylor was not denied effective assistance for a variety of reasons that are unpersuasive to us. Among them: trial counsel tried to check on Stockwell's availability before trial; he subpoenaed Stockwell when he found out, during trial, that the district attorney didn't intend to call him; when he learned that Stockwell was on vacation, he tried to get the report admitted anyway, which the court declined to do; he discussed a writ of prohibition with Baylor that would have continued the trial, but Baylor didn't "want to continue this"; and he could reasonably have decided to attack or minimize Baylor's confession instead of pursuing Stockwell's report, which he thought was inconclusive.

[1] We have difficulty understanding how reasonably competent counsel would not recognize "the obvious exculpatory potential of semen evidence in a sexual assault case," *Thomas v. Goldsmith*, 979 F.2d 746, 750 n.2 (9th Cir. 1992), particularly when the criminalist's report plainly indicates that the donor was an ABO nonsecretor whereas Baylor was an ABO type "O" secretor and that this "would thus eliminate" Baylor as the perpetrator unless a test (for the H antigen level) on a liquid semen sample showed that he mimicked a nonsecretor, in which case he would conform to the semen donor profile. Whether or not Stockwell's report was itself conclusive, it was one test away from tilting the scale powerfully in Baylor's direction. Even without further testing, Stockwell's report would have greatly decreased the odds that Baylor was the donor (as Stockwell testified at the evidentiary hearing, there was only a 5% likelihood that a secretor would mimic

a nonsecretor), and buttressed the credibility of Baylor's alibi and recantation at trial. For these reasons, we agree with the district court that counsel did not give reasonably effective assistance. *Strickland*, 466 U.S. at 691 (counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *see, e.g., Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (counsel ineffective where he knows of, yet fails to investigate, another person's purported confession); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (counsel ineffective where documents that indicate the defendant's history of mental problems are available yet he fails to investigate a possibility of mental impairment as a mitigating factor for sentencing purposes); *see also Sims v. Livesay*, 970 F.2d 1575, 1580-81 (6th Cir. 1992) (counsel was ineffective where counsel knows of a potentially exculpatory gun residue report yet counsel fails to investigate adequately).

B

The more difficult question is whether Baylor was prejudiced, the second prong of the *Strickland* analysis. Baylor confessed, and his confession was corroborated by the victims' version of the attacks. Although he testified that his confession was coerced, there is no finding that it was; also, Baylor confessed to details that the state argues would have been unknown to the victims or the detective. In particular, Baylor confessed that he removed five bullets from a gun he found in the first victim's house and put them under the cushion of a large chair in her living room. There is evidence that these bullets were not discovered until after Baylor told Roderick where they were. Also, as the state points out, the jury credited Roderick's testimony instead of Baylor's. In any event, the state contends, the case against Baylor was strong even with the laboratory reports produced at the evidentiary hearing, because the reports were inconclusive and disputed.

[2] Although Baylor's confession is strong evidence that he committed both assaults, we cannot say that the district court

erred in concluding that he was prejudiced. Our confidence in the outcome of the trial is shaken by the results of the test on Baylor's semen that Stockwell's report suggested would resolve his secretor status. The laboratory reports, and the analysis of two different experts, indicate that Baylor does not mimic a nonsecretor and therefore can be excluded as the donor of the semen found on the first victim.

The state argues that the science upon which Baylor relies isn't reliable because, for example, serological tests performed in 1994 do not necessarily eliminate Baylor since his semen could have changed over the course of seven years, and because of the possibility that the semen recovered from the victim's vaginal swab wasn't Baylor's and that Stockwell missed "H" antigens present on the original sample due to operator error. Baylor's expert says otherwise, and after carefully considering all the evidence, the district court found that Stockwell's reasons for concluding that the scientific evidence that would have been presented at trial may not have excluded Baylor are without scientific foundation. We cannot say that the court clearly erred.

[3] The state also argues that even in the face of evidence arguably excluding Baylor as the semen donor, that evidence cannot overcome the force of his detailed confession. As the district court concluded, however, reasonable doubt about the rape of the first victim would necessarily have raised a reasonable doubt about the validity of his confession. Inasmuch as all of Baylor's convictions were based on the same confession, we cannot disagree with the court's conclusion that there is a reasonable probability that the evidence that would have been presented but for counsel's ineffective assistance would have injected reasonable doubt in regard to all his counts. There were no witness identifications, and there was no physical evidence linking Baylor to the crime scenes. Baylor has, therefore, shown prejudice. *Strickland,* 466 U.S. at 694.

III

[4] Prior to oral argument, the state requested an opportunity to file supplemental briefing on the issue of the retroactivity of the Antiterrorism Act. In turn, we asked both parties to brief the applicability of the Act. Having considered the supplemental briefs, we conclude that whether or not the Act applies to pending appeals, our decision would be the same. Section 2254(d), upon which the state relies in this case, provides that a writ of habeas corpus shall not issue unless the petitioner establishes that the state court decision was contrary to clearly established federal law as determined by the United States Supreme Court. In this case, the state court decision was contrary to clearly established federal law determined by the Court in *Strickland. See Ayala v. Speckard,* __ F.3d __, 1996 WL 390969, at *7 (2d Cir. July 15, 1996) (adopting similar approach).

To the extent that the state suggests that the Act somehow makes the district court's evidentiary hearing irrelevant, we disagree. It appears to argue that federal courts lack jurisdiction to review anything other than the state court judgment. Without regard to how the Act may change the way things are done in the future, in this case both parties agreed that the evidentiary hearing was proper and Baylor's first chance to develop the factual basis of this claim was in the federal district court. We therefore decline to disregard what the district court did.

AFFIRMED.

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APPENDIX B

FILED: OCT. 24, 1996

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONNIE EARL BAYLOR,
Petitioner-Appellee,

v.

WAYNE ESTELLE, WARDEN;
ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,
Respondents-Appellants.

Before:BRUNETTI and RYMER, Circuit Judges, and TANNER,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Brunetti and Rymer vote to reject the suggestion for rehearing en banc and Judge Tanner so recommends.
The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).
The petition for rehearing is DENIED and the suggestion for a rehearing en banc is **REJECTED**.

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* Honorable Jack E. Tanner, Senior United States District Judge, Western District of Washington, sitting by designation.

APPENDIX C

FILED: AUG. 15, 1990

ORDER DENYING WRIT OF HABEAS CORPUS

No. S016124

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE RONNIE EARL BAYLOR

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

"s/Panelli"
Acting Chief Justice